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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re R.F., a Person Coming Under the Juvenile
Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

R.F.,

Defendant and Appellant.

F077642

(Super. Ct. No. JW13804100)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Lorna H. Brumfield,
Judge.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Darren K.
Indermill and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Meehan, J. and Snauffer, J.

Minor R.F. contends on appeal that insufficient evidence supported the gang enhancements attached to his convictions. The People concede and we agree. Accordingly, we reverse the findings and orders of the juvenile court regarding the enhancements and remand for a new dispositional hearing.

PROCEDURAL SUMMARY

On December 7, 2017, a Welfare and Institutions Code section 602 petition containing multiple allegations was filed against minor.

On April 10, 2018, the juvenile court found that minor committed carjacking (Pen. Code, § 215, subd. (a);¹ count 1), unlawful driving or taking of a vehicle (Veh. Code, § 19851, subd. (a); count 2), buying or receiving a stolen vehicle (§ 496d, subd. (a); count 3), driving in willful or wanton disregard for safety of persons or property while fleeing from a pursuing police officer (Veh. Code, § 2800.2; count 4), being a minor in possession of ammunition (§ 29650; count 6), misdemeanor hit and run with property damage (Veh. Code, § 20002, subd. (a); count 8), and misdemeanor resisting arrest (§ 148, subd. (a)(1); count 9). The court found true gang allegations connected to the felony counts 1 through 4 and 6 (§ 186.22, subd. (b)(1)).

On April 24, 2018, the juvenile court declared minor a ward of the court, granted him probation, removed him from his parent's custody, and committed him to the Kern Crossroads Facility program. The court ordered that upon completion of the program minor be transferred back to juvenile hall pending a suitable home placement by the probation officer. The court determined that minor's maximum confinement time was 19 years eight months, minus 141 days for time served.

On June 14, 2018, minor filed a notice of appeal.

¹ All statutory references are to the Penal Code unless otherwise noted.

FACTS

On December 4, 2017, K.J. reported her van stolen in Lamont.

On December 5, 2017, C.M. went to her boyfriend's house sometime after 9:00 p.m. She was alone in her Honda Civic. She sat in the parked Honda for about four minutes under the street light outside her boyfriend's house, texting him to ask if he was going to come out or if she should go in. He told her to come in, so she got out of the car and turned around to get her things from the passenger seat. As she turned around, she saw a van pull up behind and to the side of her, and saw minor get out. He was wearing a black sweater with the hood up. She looked at his face. He pointed a small gun at her forehead and asked her to give him her car keys. She was in shock and did not move or speak. He again asked for the keys and told her not to say anything or he would shoot. She was afraid he would shoot her. She handed him the keys and walked away. Minor took off in the Honda and the van followed.

The same night, at approximately 11:50 p.m., Deputy Sheriff Dunshee was on duty in a uniform and a marked patrol vehicle. He observed a Honda Civic parked in a unusual area and, as he passed the Honda, he illuminated it and saw the driver duck down and turn his head. When the Honda drove away, Dunshee activated his lights and initiated a traffic stop based on the Honda's tinted windows. When the Honda failed to stop for a stop sign, Dunshee activated his siren. Dispatch informed him the Honda had been carjacked by an armed subject. A second patrol vehicle, driven by Deputy Sheriff Vega, joined the accelerating chase of the Honda. The Honda hit a parked car but did not stop. Eventually, the Honda entered a cul-de-sac and was trapped by the patrol vehicles. When the Honda stopped, Vega saw minor sitting in the driver's seat. The deputies drew their weapons and gave verbal commands for the occupants to exit with their hands up. Dunshee saw the passenger reach into the back seat, and the deputies again yelled at them to get out and show their hands. Minor, who was wearing a black hat, a jacket, and jeans,

got out of the driver's seat, ran, and jumped a residential fence. The passenger did the same. Dunshee pursued the passenger but was not able to catch him. Vega pursued minor and repeatedly yelled commands at him, but minor disobeyed the commands and jumped a fence into a backyard. He discarded his hat in the yard and jumped another fence. Vega maintained his pursuit. Eventually, minor slowed down, removed his jacket, and discarded it on the ground. He turned to face Vega but refused to obey his orders to get on the ground. Minor told Vega he was "just walking home and wasn't doing anything." Vega forced minor to the ground. Minor attempted to push himself up off the ground. When minor was subdued, Vega handcuffed him. Another deputy put minor in a patrol vehicle. Deputies recovered minor's hat, which had the letters "KC" on it.

The Honda was searched and found to contain live ammunition on the driver's side, both in the door and on the floorboard.

Later, the stolen van was located. C.M. identified it as the van the suspects used when they carjacked her Honda. She also identified minor as the carjacker in a field showup.

At trial, Deputy Sheriff Fernandez, the gang expert, testified he was part of the gang suppression section and was partly responsible for investigating the Lamont 13 gang and its crimes. At trial, Fernandez explained the importance of respect in the gang to promote a gang member's standing. Juvenile members were often used to commit crimes because they faced lesser consequences than adult members. In turn, the juveniles would receive respect and acceptance from the older members.

Based on various evidence of photographs and interviews, among other things, Fernandez opined that defendant was an active member of the Lamont 13 criminal street gang. Then the following discussion of hypothetical situations occurred:

“[PROSECUTOR:] And—now, referring to your—based upon your training and experience, if you have an individual who in the past has possessed indicia of Lamont 13, including a blue bandana, a phone with a picture displaying his moniker and VCL X3, having worn a hat with—a

black hat with white lettering of KC on it, with photos on his Facebook page showing signs of an L and VCL with his fingers, as well as displaying his moniker and VCL L13, who is in a stolen minivan with another individual and approaches a female who's getting out of her car and points a gun at her forehead, demands her car keys, and orders her to not say anything or that he would shoot her, is that something that is for the benefit of, at the direction of, or in association with a criminal street gang?

“[FERNANDEZ:] Yes.

“[PROSECUTOR:] And how so?

“[FERNANDEZ:] In association with and for the benefit of.

“[PROSECUTOR:] And how so?

“[FERNANDEZ:] Based on my training and experience, I know gang members commit violent crimes, like carjackings, assault, deadly weapons, weapons possession to enhance the gang's reputation within the community and the individual gang member's reputation within the gang.

“When a gang member goes and commits a carjacking at gunpoint *in a rival territory*, it shows that the gang's not scared of the rival gang members. It shows that *they're willing to participate in crime with other gang members because there was a driver of the van and then the subject with the gun.*

“When gang members commit crimes like this, they promote fear and intimidation in the community. He promoted that fear and intimidation by telling the victim in this crime that he was going to shoot her in the head. That would promote the gang and go to their benefit. When members of the community are intimidated by gang members, then they're less likely to commit crimes [sic], which, in turn, allows the gang to continue to operate illegal activities.

“[PROSECUTOR:] And is that the manner in which it would promote, further, or assist criminal activity or conduct by gang members?

“[FERNANDEZ:] Yes.

“[PROSECUTOR:] And now in that same hypothetical, with the additional facts of after threatening the female where he takes the keys, takes the car, and then flees along with the stolen minivan that he was first coming from, where they eventually abandon that minivan, and then is observed approximately two hours after that initial taking of the car in an

area that is—in an area that is—not remote, in an area where there are not a lot of individuals, where contact with law enforcement causes that individual to duck and try to avoid identification, and then—and then—and then as law enforcement tries to make contact with him, he drives in the opposite direction of the law enforcement and, as law enforcement is following him, fails to stop at a stop sign and, as law enforcement continues to follow with the sirens and lights on, continues to accelerate, fails to stop at another stop sign, hits a parked car, and yet fails to stop at the collision scene while still being followed by law enforcement, does that in any way—is that in any way for the benefit of, at the direction of, or in association with a criminal street gang?

“[FERNANDEZ:] It’s to the benefit of and in association.

“[PROSECUTOR:] How so?

“[FERNANDEZ:] *There’s multiple members in the car. They just committed a carjacking. Them fleeing from law enforcement benefits the gang by trying to avoid being arrested; that allows the members to remain out of custody and continue their illegal activities. And then it’s also in association with the gang members that are in the vehicle with him. They’re working together to get away from law enforcement.*

“[PROSECUTOR:] Now, in addition to that hypothetical, we also have the individual fleeing once that vehicle stops with the passenger, where he is wearing the hat—he was wearing a hat, a black hat with the letters KC on it. And is that also, in your opinion, something that is for the benefit of, at the direction of, or in association with a criminal street gang?

“[FERNANDEZ:] Yes.

“[PROSECUTOR:] How so?

“[FERNANDEZ:] It’s for the benefit of and—for the benefit of.

“*When somebody’s wearing gang clothing, like the KC hat, it shows that they’re active, and it’s like a walking billboard showing that they’re a member of the gang.* [¶] It’s been my experience that people—or that gang members wear the KC hat to show that they’re from Kern County. It’s very common with gang members in this area.

“[PROSECUTOR:] Now, in that same hypothetical where ammunition—in that same hypothetical, and in addition there is five live rounds of ammunition found in the vehicle, is that in the benefit of, at the direction of, or in association with a criminal street gang?

“[FERNANDEZ:] It would be to the benefit of.

“[PROSECUTOR:] And how so?

“[FERNANDEZ:] Gang members steal cars. And it’s been my experience that they’ll go out and steal a car and then commit other crimes. The car was stolen in a carjacking with a firearm; so there would be—ammunition would be necessary to operate the firearm. And it’s—it would benefit the gang by having a vehicle to transport other gang members to—to and from other crimes, or even just transporting them from outside their traditional boundary back to Lamont within their traditional boundaries.” (Italics added.)

On redirect, the prosecutor asked Fernandez about indicators and factors he took into account to support his opinion that minor was a Lamont 13 gang member. Fernandez answered: “*Wearing gang clothing at the time of the crime. He’s documented with other gang members and displaying gang hand signs. Or contacted with other gang members in commission of the crime with another person.*” (Italics added.) On recross-examination, Fernandez noted that the passenger in the Honda still had not been identified. On further direct examination, Fernandez explained that in looking at the crime, he would “have to take the totality of the circumstances into consideration: Where the crime occurred, who the victims of the crime are, the clothing worn at the time of the crime, things that are said during the crime, the crime itself. All of those things would be taken into consideration.”

Defense Testimony

Minor testified that he spent all day with his girlfriend. Then as he walked toward home, he accepted a ride and got into the back seat of the Honda. There was already a driver and a passenger in the car. When the driver and passenger got out and ran from the deputies, minor ducked down, waited, and got out when everyone was gone. Then he started walking home. He discarded his sweater because he did not want to be associated with the Honda’s driver and passenger. This is when Deputy Vega found him and arrested him.

Minor stated he was not a gang member, but he was familiar with gang members and gang signs. He was just trying to act like everyone else and be cool when, for example, he posed for the photographs and displayed gang signs. Most of the people in the photographs were just playing around and were not gang members.

DISCUSSION

Minor contends that even if the evidence suggested he was a gang member, it failed to show he committed the crimes to benefit a gang. The People concede.

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ ” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).) “[S]peculation, supposition and suspicion are patently insufficient to support an inference of fact.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951.)

“Section 186.22, subdivision (b)(1), enhances the sentence for ‘any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ ” (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170 (*Livingston*).) A gang enhancement under section 186.22, subdivision (b)(1) has two elements or prongs—the gang-related crime prong, and the specific intent prong. (*Albillar, supra*, 51 Cal.4th at pp. 60, 65.)

Under the first prong, the prosecution must show the underlying crime was gang related. (*Livingston, supra*, 53 Cal.4th at p. 1170; *Albillar, supra*, 51 Cal.4th at p. 67.) “Not every crime committed by gang members is related to a gang”; even when gang members commit a crime together, that crime may not be gang related (*Albillar*, at p. 60; *id.* at p. 62 [it is “ ‘conceivable’ ” they might “ ‘be on a frolic and detour unrelated to the gang’ ”]; *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1364 [§ 186.22, subd. (b) should not be expanded by opinion testimony “to cover virtually any crime committed by someone while in the company of gang affiliates, no matter how minor the crime, and no matter how tenuous its connection with gang members or core gang activities”]). Mere membership in, or association with, a criminal street gang does not suffice to support the gang-related prong. (*People v. Rios* (2013) 222 Cal.App.4th 542, 574.)

Under the second prong, the prosecution must show what might be called a gang-related intent—that is, that the defendant acted with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*Livingston, supra*, 53 Cal.4th at p. 1170.) Specific intent “ ‘is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.’ ” (*People v. Rios, supra*, 222 Cal.App.4th at pp. 567–568.)

Expert opinion is a permissible source of evidence to support a gang enhancement. (*Albillar, supra*, 51 Cal.4th at p. 63.) “While an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the ‘hypothetical question must be rooted in facts shown by the evidence.’ [Citation.] Indeed, an ‘expert’s opinion may not be based “on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors.” ’ ” (*People v. Franklin, supra*, 248 Cal.App.4th at p. 949; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197 [“Generally, experts may state their opinion based upon facts given in a hypothetical question asking them to assume their truth; however, the hypothetical must root itself in facts shown by the evidence.”]). “If experts base an opinion on material not admitted into evidence, the material must be reasonably

relied upon by experts in that particular field in forming their opinions and be reliable. [Citation.] ‘ “Like a house built on sand, the expert’s opinion is no better than the facts on which it is based.” ’ ” (*In re Frank S.*, at p. 1197.)

Here, Fernandez opined (as shown in the italicized testimony above) that commission of a carjacking by an armed gang member in rival territory shows the gang is not afraid of its rivals. A person wearing a KC hat is like a walking billboard advertising his gang membership. The crime shows the gang member is willing to commit crimes with other gang members because the driver of the van is also a gang member. Multiple gang members in a vehicle can work together to evade law enforcement. Fernandez also explained that two of the reasons he believed minor was a gang member were that he wore gang clothing at the time of the crime and that he committed the crime with another gang member.

Fernandez’s house was built on sand: the hypothetical facts he discussed did not reflect the facts of this case, where there was no evidence that the crime occurred in rival territory, that minor wore the KC hat during the commission of the crime or that the hat was seen by C.M. (on the contrary, she testified minor was wearing a hood), that minor’s companion was a gang member, or that they were working together for a gang purpose. Thus, Fernandez’s opinion that minor committed a gang-related crime to benefit a gang was rooted in speculation, not evidence. Furthermore, the evidence that did exist was not sufficient. Nothing connected minor’s possible gang membership to the crime. (See, e.g., *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661–663 [while carjacking was a signature crime of gangs in general, circumstances of offense did not establish that carjacking was gang related because defendant did not call out a gang name, display gang signs, wear gang clothing, brag about the crime, or commit the crime with another gang member in gang or rival gang territory; expert’s opinion was based solely on speculation, not evidence]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851–852 [defendant’s commission of a crime with another gang member in gang territory was insufficient

standing alone to give rise to anything more than a possibility that the crimes were gang related; expert's opinion was speculation].) Similarly, Fernandez's opinion that minor was a gang member was based, at least in part, on facts not in evidence.

We conclude the juvenile court's findings that minor committed gang-related crimes for the benefit of a gang were not supported by substantial evidence.

DISPOSITION

The juvenile court's true findings and dispositional orders regarding the gang enhancements pursuant to Penal Code section 186.22, subdivision (b)(1) are reversed. The remaining findings and orders of the juvenile court are affirmed. The matter is remanded for a new dispositional hearing and calculation of a new maximum confinement time. The court is directed to prepare amended orders reflecting the modified findings and orders, and to forward certified copies to the relevant entities.